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STATE OF WASHINGTON

NO. 84369-4

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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JACK and DELAPHINE FEIL, husband and wife; JOHN and WANDA  
TONTZ, husband and wife; and THE RIGHT TO FARM ASSOCIATION  
OF BAKER FLATS,

Petitioners,

v.

THE EASTERN WASHINGTON GROWTH MANAGEMENT  
HEARINGS BOARD, et al., (No. 82399-5)

and

DOUGLAS COUNTY; DOUGLAS COUNTY BOARD OF COUNTY  
COMMISSIONERS; WASHINGTON STATE DEPARTMENT OF  
TRANSPORTATION; WASHINGTON STATE PARKS AND  
RECREATION COMMISSION; and PUBLIC UTILITY DISTRICT  
NO. 1 OF CHELAN COUNTY, (No. 82400-2)

Respondents.

Consolidated on Appeal

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**STATE'S ANSWER TO AMICUS CURIAE BRIEF IN SUPPORT  
OF PETITION FOR REVIEW**

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## **I. IDENTITY OF RESPONDENTS**

The State of Washington, acting through the Washington State Parks and Recreation Commission (State Parks) and Washington State Department of Transportation (WSDOT), is a Respondent at all stages of the proceedings below.

## **II. ARGUMENT**

The purpose of an amicus brief is to assist the appellate court by clarifying the legal issues. RAP 10.6. In this case, the brief of Pacific Legal Foundation (PLF) mischaracterizes the final action by the county commissioners, confuses the legal issue by introducing new information outside the record that has nothing to do with the zoning issue before this Court, and goes on to restate the legal argument made by the Petition, and as such is redundant.

The petition for review should be denied because this Court has squarely addressed the applicable law in *Woods v. Kittitas Cy.*, 162 Wn.2d 597, 174 P.3d 25 (2007). The Court of Appeals correctly applied this precedent to the facts of this case. Petitioners introduced no new facts or legal arguments to distinguish the holding in *Woods* or to suggest that a different legal principle should be applied. As pointed out in *Woods*, only the Legislature can effect the statutory changes that would satisfy the petitioners' concern.

### **A. The County Commissioners Approved a Project Permit**

PLF misstates three facts in its summary of the case that should be corrected. First, PLF says that the recreational use was not authorized by

the county's subarea plan. Amicus Br. at 2. The subarea plan for the greater East Wenatchee area encouraged development of the project: "The current trail system should be increased to extend north to connect with Lincoln Rock State Park." AR Vol. 21, 0-3811. The trail location was identified in a map as early as the 1988 comprehensive plan. Clerk's Papers (CP) Vol. 40A, 0-7674 (VT at 25 ll. 17-21). The location of the proposed trail was marked with a dotted line. AR Vol. 20, 0-3735.

Second, PLF says that the county circumvented its own land use laws by enacting legislation to allow recreational use within the resource lands. To the contrary, nothing in the record supports a conclusion that the county commissioners were enacting legislation. The permit was issued pursuant to existing zoning regulation. A project permit can be approved by ordinance without changing the character of the approval into a legislative action. RCW 36.70A.030(7).

Third, PLF alleges that the County amended its development regulation to allow this use. In fact, the County action implemented the zoning law; it did not amend it. The existing Recreational Overlay regulations set forth the development standards and criteria that control subsequent applications for land use in various zoning classifications. The County Commissioners approved the project and conditioned the project as authorized by the existing regulations.

**B. PLF Attempts to Confuse this Court with Unrelated News Articles**

At pages 6 and 7 of its Amicus Brief, the PLF asks this Court to review certain newspaper links and reports that have nothing to do with the particular permit at issue. Adding to the confusion, the news links have nothing to do with zoning in general. The Respondents object to the improper introduction of such information in general because it is not part of the administrative record in this LUPA appeal. Nor was there a timely motion to supplement the record in this case.

Notwithstanding the irrelevance of the news links, this information only confuses the issue before this Court. More importantly, the information does not support granting the petition for review because none of the articles address conflicts under the Growth Management Act or local permitting.

For example, PLF refers the Court to an article relating to land owned by the Department of Fish and Wildlife in Snohomish County known as Leque Island. Amicus Br. at 7 n.4. That article indicates that nature has attempted to recreate an estuary by eroding dikes created decades ago to promote farming on the estuary. The article makes no mention of zoning under the Growth Management Act, nor does it involve permits under county code. It says that the Department of Fish and Wildlife is looking at letting the land revert to its natural condition because “despite numerous attempts, WDFW ‘can’t get anyone interested in farming it.’”

Similarly, in the document referred to as “An Assessment and Recommendations for Preservation and Management of City-Owned Agricultural Land” (prepared for the City of Bainbridge), Amicus Brief at 7 n.3, the assessment actually encourages preservation of farmland, but acknowledges that recreational multi-use trails may be appropriate as a secondary goal. The article makes no mention of the interplay of GMA and LUPA jurisdiction such as that which exists in this appeal.

Whether this Court should accept review of this case must be answered in light of the record supporting the trail permit issued by Douglas County.

**C. Only the Legislature Can Address the Perceived Problem Raised by Petitioner**

PLF argues that the Court of Appeals’ decision creates a loophole that allows the County to circumvent the agricultural resource land protection required under the Growth Management Act. To the contrary, the Court of Appeals applied the law as written by the Legislature and interpreted by this Court in *Woods v. Kittitas Cy.*, 162 Wn.2d 597, 174 P.3d 25 (2007). The Eastern Washington Growth Management Hearings Board, the Douglas County Superior Court, and the Court of Appeals all concluded that the permit issued to State Parks was a “project permit” as defined under RCW 36.70B.020. PLF is essentially arguing that such a finding creates a potential loophole if the zoning law authorizing the permit was not consistent with the requirements of the GMA. That is essentially the same argument raised by Petitioners.

It is also the same legal issue recognized and addressed by this Court in *Woods*. In *Woods*, the Court acknowledged that there may, under some circumstances, be a potential problem if an actual regulation authorizing a permit, but not appealed as provided under the GMA, does not comply with the GMA. *Woods v. Kittitas County*, 162 Wn.2d at 614. This Court, acknowledging the doctrine of separation of powers, held its “role is to interpret the statute as enacted by the Legislature . . . ; we will not rewrite the [GMA].” *Id.*

The GMA imposes a strict time limit on appeals. The Land Use Petition Act facilitates timely review of land use decisions. These appeal periods were kept short to provide certainty to land-use projects. See *Deschenes v. King Cy.*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974); see also *City of Federal Way v. King Cy.*, 62 Wn. App. 530, 538, 815 P.2d 790 (1991). Absent such limitation periods or the exclusive jurisdictional limits, projects and regulations potentially could be subject to endless collateral attack. These statutes further specific legislative policies. PLF itself acknowledges in its brief that it is incumbent on citizens to challenge regulations they perceive to be not in compliance with the GMA. Amicus Br. at 8. It is up to the Legislature to change these statutes if it deems such a change desirable.

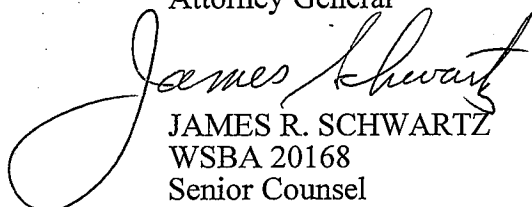
Because the power to change the law as requested by Petitioners and PLF lies solely with the Legislature, this Court can give the Petitioners no judicial relief for the change they want.

### III. CONCLUSION


The Petitioners' request for review should be denied. The Court of Appeals properly applied the statutes and judicial precedent to the facts of this case. Only the Legislature can address the alleged statutory problem.

RESPECTFULLY SUBMITTED this 15th day of June, 2010.

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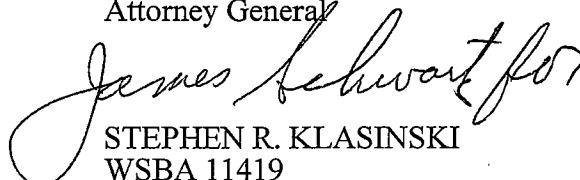


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